In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-534

STANLEY G. WELSH ET AL.,
PETITIONERS,

v.

RICHARD L. KINCHLA ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

RICHARD WAIT,
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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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In the
Supreme Court of the United States.

October Term, 1978.

No. .

STANLEY G. WELSH et al.,
Petitioners,

v.

RICHARD L. KINCHLA et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioners, Stanley G. Welsh et al., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this proceeding on June 30, 1978.

Opinions Below.

The opinions of the Court of Appeals and the District Court for the District of Massachusetts appear as appendices hereto.

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was dated and entered on June 30, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

Whether a person who has suffered pecuniary loss due to actions taken by a private party pursuant to a state statute which is thereafter held to be violative of the Constitution of the United States has a cause of action against the actor for money damages under the provisions of 42 U.S.C. § 1983?

Stated otherwise, did the deprivation by the respondents, acting under color of state law, of certain of the petitioners' rights and privileges secured by the Constitution give the petitioners a cause of action for money damages as "redress" under 42 U.S.C. § 1983?

Statutory Provisions Involved.

UNITED STATES CODE, TITLE 42.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Statement of the Case.

This is an action brought under the provisions of § 1983 of Title 42 of the United States Code, in which the petitioners seek damages arising from pre-trial attachment of their land made in conformity to the provisions of Massachusetts General Laws c. 233, §§ 42 and 66, without any notice or hearing. The jurisdiction of the District Court was invoked under the provisions of 28 U.S.C. §§ 1343(3) and 1343(4), and 28 U.S.C. §§ 2281 and 2284. It has been established in this litigation that the attachment so made was constitutionally invalid.

The respondent Kinchla was a real estate broker who claimed that the petitioners became indebted to him for a large fee as commission on a proposed sale of the petitioners' real estate to a customer of his, which sale was never consummated. On November 8, 1972, the respondent Richard L. Kinchla Real Estate, Inc., instituted an action against the petitioners in the Massachusetts Superior Court to recover the commission which it claimed, and made a real estate attachment in the amount of $350,000 pursuant to the Massachusetts statute, without any prior notice.

For reasons which do not appear, the respondent Kinchla Real Estate, Inc., did not enter the action in court, but instead on January 2, 1973, the individual respondent, Richard L. Kinchla, commenced a second action and made a second *ex*

parte real estate attachment. For reasons which, again, do not appear, this time the attachment was in the sum of $225,000 rather than $350,000.

On September 22, 1972, the District Court for the District of Massachusetts had decided the case of *Schneider* v. *Margossian*, 349 F. Supp. 741, which decision held that an attachment made by way of trustee process under the Massachusetts statutes without prior notice to the defendant was an unconstitutional invasion of the defendant's rights.

Any difference between the constitutional infirmity of the Massachusetts practice under General Laws c. 246 (the trustee process statute) by reason of the failure to require notice and opportunity to be heard prior to the effectiveness of the attachment, and the infirmity for the same reasons of the provisions of General Laws c. 223, dealing with real estate attachments, is negligible, and once the trustee process statute was held unconstitutional it was patent that the real estate attachment procedure could no longer stand. The point was promptly raised and so determined in *Bay State Harness Horse Racing & Breeding Association, Inc.* v. *PPG Industries, Inc.*, 365 F. Supp. 1229 (D. Mass.), which was decided August 7, 1973, by the opinion of a three-judge court. The petitioners in the matter now before the court participated in the *Bay State* case as *amici curiae*. *Id.* at 1301. The three-judge court ordered that the judgment entered by it be applicable to the "parties in the cases at bar, including parties in cases not heard orally but who have participated as *amici curiae* in the proceedings before the court" (365 F. Supp. at 1307), which included the present petitioners.

The complaint in the case at bar was filed in the District Court on February 21, 1973. The plaintiffs moved for partial summary judgment to establish the invalidity of the attachments on the basis of the *Bay State* decision, and on January 24, 1975, the District Court so ordered (Appendix A).

Thereafter the case was tried on the issue of damages. The testimony showed the out-of-pocket expenses suffered by the petitioners resulting from the attachments of their real estate and the cost of removing the same. These charges included bills from counsel for the petitioners, running to $12,606.01, and expenses of maintenance of the property attached pending the disposal of the attachments, which ran to the net amount of $2,617.98. Then there was the cost of a title insurance policy which the purchaser acquired, which ran to $4,125. There were real estate taxes of $9,375.08 payable in 1973 which would have fallen upon the purchaser of the land had the sale not been held up by the attachments. Finally, there was loss of revenue which would have been received as income on the $1,900,000 payable to the petitioners by the purchaser. The delay in payment, which was solely referable to the attachment, was for a period of nine months and twenty-eight days which at 6 per cent interest amounted to some $94,000.

Nevertheless an opinion and order was entered on October 13, 1977, to the effect that the respondents' motion for judgment should be allowed, and the complaint was "dismissed because, upon the facts and the law, no right to relief has been shown" (Appendix B, p. 7a).

A timely appeal from the District Court's dismissal was taken by the petitioners to the Court of Appeals for the First Circuit. The Court of Appeals affirmed the judgment of the District Court, holding that a plaintiff, to obtain damages, "must show some kind of ulterior motive on the part of the defendant or other evidence of wrongfulness sufficient to establish malice" (Appendix C, p. 11a).

Reasons for Granting the Writ.

I. THE DECISION BELOW INVOLVES AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW CONCERNING THE REDRESS AVAILABLE UNDER 42 U.S.C. § 1983 WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The question whether a cause of action for money damages arises under 42 U.S.C. § 1983 against a person who follows a state statutory scheme which a court subsequently strikes down as unconstitutional is a question of tremendous importance which has occurred frequently in the past, and which will very likely recur in the future, but which has never been addressed by this Court. Section 1983 has become a vitally important tool both in shaping man's interaction with his government and his peers and in providing a means of redress for those who suffer a deprivation of rights, privileges, or immunities secured by the Constitution. Although the amount of litigation brought under this statute has burgeoned in recent years, see Note, *Developments in the Law — Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1136 (1977), and the annotations to this one section now consume some 468 pages of the annotated code, there is no decision of this Court addressing the question whether "redress" as provided for in the statute includes money damages for harm resulting from actions taken under a statute which is later found to be unconstitutional.

The lack of a definitive decision on this question has led to uncertainty and conflicting rationales in the application of 42 U.S.C. § 1983 by the courts, as demonstrated by the decisions cited below. For example, the District Court in this case, in dismissing the petitioners' complaint and entering judgment in favor of the respondents, quoted language which flatly prohibited any recovery of money damages for actions taken in reliance on a statute later held to be unconstitutional. However, the Court of Appeals, in affirming the judgment of the District Court, expressly approved the recovery of money damages where a plaintiff shows "ulterior motive" or "other evidence of wrongfulness sufficient to establish malice" (Appendix C, p. 11a).

Other decisions cited in the opinion of the Court of Appeals are indicative of the lack of any consistent standard regarding liability under § 1983. In *Kacher* v. *Pittsburgh National Bank*, 545 F. 2d 842, 847 (3d Cir. 1976), the court denied liability on the basis that the defendant's action lacked the "essential ingredient of tort liability at common law." Accord, *G.H. McShane Co., Inc.* v. *McFadden*, 554 F. 2d 111, 114 (3d Cir.), *cert. denied*, 434 U.S. 857 (1977). On the other hand, in *Tucker* v. *Maher*, 497 F. 2d 1309 (2d Cir.), *cert. denied*, 419 U.S. 997 (1974), the court required a showing of "improper motive." 497 F. 2d at 1315. The court in *Rios* v. *Cessna Finance Corp.*, 488 F. 2d 25, 28 (10th Cir. 1973), did not allow recovery in any circumstances, stating simply that "damages are not collectible in a civil rights action against one who followed a statutory procedure presumed to be constitutional."

None of the cases cited sets forth any clear or uniform guideline or standard for imposition of § 1983 monetary liability, nor does any of them support the conclusion of the Court of Appeals that a plaintiff must establish "malice." What they do demonstrate is that there exists an important, recurring and unresolved question of federal law which should be settled by this Court.

II. THE COURTS BELOW ERRED IN THEIR DENIAL OF THE PETITIONERS' CLAIM FOR REDRESS UNDER 42 U.S.C. § 1983.

A. The holding of the Court of Appeals goes well beyond any of the cases cited therein. The court's rationale appears to

be based upon the statement that "damages are not collectible in a civil rights action against one who followed a statutory procedure presumed to be constitutional" which appears in *Rios* v. *Cessna Finance Corp.*, 488 F. 2d 25, 28 (10th Cir. 1973). In the opinion in *Rios* the Tenth Circuit cited as authority for the statement the case of *Baxter* v. *Birkins*, 311 F. Supp. 222 (D. Colo. 1970), but the holding in *Birkins* does not go nearly as far as the court went in the present case.

In the *Birkins* case it was clear that the parties against whom the court refused to award damages were officials who in good faith relied upon the statutory provisions. At page 226 of the *Birkins* decision the court stated: "The officials here are no less protected by the defense of good faith than were the police officers in *Pierson*" v. *Ray*, 386 U.S. 547 (1967), which dealt solely with police action, and the *Birkins* court went on to say: "We believe that the core of plaintiffs' position must be that these state officials must be brought to court to personally account for failing to 'predict the future course of constitutional law.' . . . That argument must fall. . . . Defendants cannot be held personally liable for their acts in this case." *Ibid.* The court was talking only about personal liability of an official who acts as an official, and not of a party who is seeking for personal reasons to profit by his own application of the statute.

In the case at bar, the petitioners seek no relief from any official on account of any official act of his under a statute later held unconstitutional.*

The same distinction applies to *Tucker* v. *Maher*, 497 F. 2d 1309 (2d Cir. 1974), *cert. denied*, 419 U.S. 997 (1974). In that case the court decided flatly than an *official* is justified in

* Although for procedural reasons Stephen Weekes, the Registrar of Deeds, was named in the complaint as a defendant, the petitioners do not now, nor have they in any past proceeding, sought damages from the Registrar, in either his official or personal capacity.

following the letter of the statute which has not yet been struck down, but a similar justification was not available in that case in favor of the private defendants. As to them, the plaintiffs' claim was treated as one for malicious prosecution, and no personal immunity was available.

Petitioners agree that there must be provision for protecting public servants who are required to enforce presumably valid statutes even though the statutes ultimately may be held to be unconstitutional. As long as a public official acts in good faith, there is every reason to protect him, even though his acts do result in violation of a plaintiff's civil rights. But the violation of rights by a private citizen who acts in his own interest and for his own profit is different indeed. There is no such justification for granting either absolute or qualified immunity. That is the present case and that is the distinction which apparently the Court of Appeals and the District Court did not recognize.

B. A second ground of error is that there is no basis for granting only partial redress, as was done here, where § 1983 states that a person in the position of the respondents "*shall be liable* to the party injured in an action at law, suit in equity, or other proper proceeding *for redress*." (Emphasis added.) There is nothing to suggest that the redress shall not be complete, and in the situation which is presented in the case at bar complete redress very clearly was not granted.

The District Court in its memorandum dated January 24, 1975, dissolved the attachments, but it stopped short of providing full "redress" as provided for under § 1983. In *Marshall* v. *Sawyer*, 301 F. 2d 639, 646 (9th Cir. 1962), the Court of Appeals said:

> The *only elements* which need to be present in order to establish a claim for damages under the Civil Rights Act are that the conduct complained of was *engaged in* under

color of state law, and that such conduct *subjected* the plaintiff to the deprivation of rights, privileges, or immunities secured by the Constitution of the United States. (Emphasis added.)

Accord: *Davis* v. *Board of Trustees of Arkansas A & M College*, 270 F. Supp. 528, 531 (E.D. Ark. 1967). The petitioners were deprived, under color of state law, of certain rights secured by the Constitution, and accordingly they are entitled to full and complete redress for the damages they suffered. Conceivably, lack of malice might affect the *measure* of damages, but it does not constitute a ground for denying all damages where significant monetary injury was plainly established.

C. The petitioners further contend that under the principles set forth in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), full retroactive application of *Bay State* applies to the petitioner's action.

The first inquiry required by *Chevron Oil* is whether the party urging nonretroactivity should have relied upon "clear past precedent." *Id.* at 106. In this case it is undeniable that *Bay State* did *not* establish a new principle of law by "overruling clear past precedent" or "deciding an issue of first impression whose resolution was not clearly foreshadowed." 404 U.S. at 106. To the contrary, the result in *Bay State*, as that court explicitly recognized, had been clearly foreshadowed in *Schneider* v. *Margossian*, decided before the attachments were made. Given the trend signalled by *Schneider* and other procedural due process cases being decided at that time, the respondents could not have reasonably relied on the constitutionality of the attachment statute.

The second factor enumerated by this Court, 404 U.S. at 107, "whether retrospective operation will further or retard" the purposes of the rule in question, also requires that *Bay State* be retroactively applied. It is self-evident that the purpose of the notice-and-opportunity-to-be-heard rules of that case would be best served by full retroactive application to pending cases.

Finally, *Chevron Oil* states that a new ruling will not be made retroactive if doing so would cause "injustice or hardship." 404 U.S. at 107. Here, however, the District Court, by dissolving the attachment before taking any evidence, had already found that the equities as well as the constitutional considerations support the petitioners. The three-judge *Bay State* court, by including the petitioners among the beneficiaries of its decision (365 F. Supp. at 1307), had made the same decision. The award of money damages was incidental to the equitable relief which had already been ordered, and is required to make the petitioners whole.

These principles concerning retroactivity support the explicit directive of the *Bay State* court that that decision be fully applied to those who participated as *amici curiae*, including petitioners in this case. Nowhere in *Bay State* or in *Chevron Oil* is there the slightest indication that only *partial* retroative relief is to be given the plaintiffs or parties similarly situated. Clearly it was the intention of the *Bay State* court to have the holding that the attachment statute was unconstitutional apply to the *amici curiae* with the same effect as if they had been named parties. They were thus to be allowed the same full redress that would have been available to them if they had been the first party to challenge successfully the attachment statute. There is no basis for the distinction made by the courts below between the awarding of equitable relief and the refusal to award the correlative damages. None of the cases cited by either court below dealt with the unusual situation presented here, where the court determining the state statute to be unconstitutional specifically made that ruling applicable to certain other pending cases.

Circuit Judge Gibbons goes even further than necessary for petitioners' position in his well reasoned dissenting opinion in *Kacher* v. *Pittsburgh National Bank*, 545 F. 2d 842, 847 (3d Cir. 1976), wherein he argues for *complete* retroactive effect of decisions like *Bay State*:

> Granting full retroactive effect to procedural due process rules in pending cases will, it seems to me, best encourage vigilance for and solicitude of such due process rights in close cases. Moreover, these rights will be most vigorously asserted by those entitled to them when such persons perceive that they will not be denied the fruits of their litigation by a prospectivity limitation. *Id.* at 850.

He concludes:

> In *Bay State Harness Horse R & B Ass'n v. PPG Industries, Inc.*, 365 F.Supp. 1299 (D.Mass.1973) (three judge court), a suit, as here, for injunctive relief, the court granted relief not only to the parties in the case but to all parties who submitted *amicus* briefs and to all cases pending in the district court. *Under Bay State Harness, Kacher would recover.* (Emphasis added.) *Id.* at 851.

Bay State Harness and *Chevron Oil* require retroactive application of the *Bay State* ruling to this case, and retroactive application means full relief for the loss suffered by the petitioners.

D. A fourth ground of error is that the petitioners should not be deprived of the fruits of their successful challenge. The petitioners have expended great amounts of time and money in challenging the constitutionality of the Massachusetts attachment statute, and it was in part by virtue of that expenditure

that the statute was determined to violate rights secured by the Constitution of the United States.

Although the court in *Bay State* made its rulings prospective in nature, thus excluding all prior attachments and actions thereon, it carved out as an exception three other actions then pending, parties to which had participated in *Bay State* as *amici curiae*. 365 F. Supp. at 1307. Even if it is arguable that an award of money damages for parties injured by attachments obtained prior to *Bay State* would be inequitable, the argument does not apply to the case at bar. After *Bay State* there was clear notice that the attachment statutes were unconstitutional; attachments made prior to *Bay State* and not included in that case were unaffected by the court's order. However, the parties to *Bay State* and the three actions specifically included by the court in its decision occupy a middle ground. These four actions constitute the judicial turning point and interface between the old and new. The parties thereto are entitled to the fruits of their successful challenge, as a matter of both equity and social policy.

As Judge Gibbons points out in *Kacher*:

> . . . [Due process] rights will be most vigorously asserted by those entitled to them when such persons perceive that they will not be denied the fruits of their litigation . . .. *Id.* at 850.

E. Finally, there is a strong argument here that if a loss is suffered by a party because of someone else's violation of his constitutional rights, and especially where the violator is not a public official, the private party actively invoking the statute should bear the risk of loss should the statute be held unconstitutional.

Judge Gibbons' opinion in *Kacher* also bears on this point:

> The issue, in weighing equities, is which party should, in the circumstances of the case at bar, bear the cost of the district court's original erroneous denial of injunctive relief. Since the bank proceeded in the face of a timely complaint against its due process violation, in the absence of a governing Supreme Court precedent, in the face of an appeal in this case and in the district court case on which it relied, with lower court authorities in disagreement on the legality of the process upon which it relied, and with the clear alternative of resorting to other methods of foreclosure of its lien which would have afforded notice and hearing, I can find no equity which should put the risk of damage on Kacher rather than the bank. *Id.* at 850.

Unquestionably, loss has been suffered. The respondents, who voluntarily utilized a statute of questionable constitutionality for their own pecuniary advantage, should bear the risk of loss now that the statute has been held to be defective. The alternative is to impose the loss on the petitioners, who initiated no action, but were required to expend and lose substantial sums of money to protect their own (as well as others') constitutional rights.

The state of facts presented to the Court fits well into the provisions of § 1983. The respondents voluntarily caused the petitioners to be deprived of their right to dispose of their own property as they saw fit. That right was secured to them by the Constitution of the United States. The respondents accomplished the deprivation by causing real estate attachments to be placed on their property under the provisions of Massachusetts statutes without any notice or hearing justifying the

attachments. The petitioners, consequently, were parties injured to whom the respondents became liable in an action at law or other proper proceeding for redress. The petitioners have suffered significant harm as a consequence, and they now seek redress. The statute says that the respondents are liable to them for that redress. The courts below have said otherwise, but in so doing have erred as to the law and have done so on a basis which raises unsettled questions of public importance which only this Court can resolve, and for which this case provides an appropriate vehicle for resolution.

Conclusion.

For the reasons stated above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Appendix A.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
No. 73-551-C

STANLEY G. WELSH, ET AL.

v.

RICHARD L. KINCHLA, ET AL.

Memorandum and Order.

January 24, 1975.

CAFFREY, Ch.J.

This is a civil action for declaratory and injunctive relief. The case arises out of a prejudgment attachment of plaintiffs' real estate by defendants which was made without affording plaintiffs notice or an opportunity to be heard by a judicial officer as to the existence of an alleged indebtedness of plaintiffs to defendants which underlies the attachment. Jurisdiction of this court is invoked under 28 U.S.C.A. §§ 1343(3) and 1343(4), and 28 U.S.C.A. §§ 2281 and 2284.

Plaintiffs are Stanley G. Welsh, a resident of the State of New York, and Marjorie W. Whittemore, a resident of the State of Florida. Defendant Richard L. Kinchla is a resident of Massachusetts and defendant Richard L. Kinchla Real Estate, Inc. is a corporation organized under the laws of Massachusetts. Prior to the filing of the instant case in this

court, Kinchla Real Estate filed an action against Welsh and Whittemore in the Barnstable County Superior Court, returnable January 1, 1973, and Richard L. Kinchla filed a separate civil action against Welsh and Whittemore in the Barnstable County Superior Court returnable February 5, 1973.

The matter came before this court on the basis of plaintiffs' motion for partial summary judgment in the nature of an order declaring the real estate attachments made in connection with the Barnstable County Superior Court litigation to be void for lack of prior notice and opportunity to be heard. The motion is based on plaintiffs' contention that a three-judge court, in *Bay State Harness Horse Racing and Breeding Ass'n, Inc.* v. *PPG Industries, Inc.*, 365 F. Supp. 1299 (D. Mass. 1973), declared the Massachusetts statutes (Mass. G. L. ch. 223, §§ 42 and 62-66) authorizing prejudgment attachment of real estate without prior notice unconstitutional because those statutes violate rights secured to the owners of real estate under the due process clause of the Fourteenth Amendment. Plaintiffs participated in the *Bay State Harness* case as *amici curiae* and the court provided that the judgment entered by the three-judge court was applicable:

> "(1) to the parties in the cases at bar, including parties in cases not heard orally but who have participated as *amici curiae* in the proceedings before the court. . . . and . . . [f]inally, the cases at bar and those cases wherein parties have participated in these proceedings as *amici curiae* are remanded to the respective judges to whom the cases were assigned upon the filing thereof, for consideration of any remaining issues."

365 F. Supp. at 1307.

In view of the fact that the three-judge court made its ruling applicable to this case, plaintiffs seek a partial summary judg-

ment herein on the constitutional issue. Defendants advised this court at a hearing held on September 24, 1973, that the *Bay State Harness* case "is not germane . . . because in this case before you the plaintiffs in this matter are out-of-state defendants," and that "there is now no other way to get jurisdiction over the out-of-state defendants." Counsel for Kinchla also advised the court "The only way under our statutes as they are now enacted, to get jurisdiction over them, is to attach their property. Therefore, the *Bay State* case has no reference."

In a brief filed November 18, 1974, counsel for Welsh and Whittemore make the representation that Welsh and Whittemore were described as residents of Massachusetts in the writs served by defendants in the Superior Court, and that service of process on them in the state court was the typical "last and usual" service which was, in fact, made at the Cotuit residence of Welsh and at the Falmouth residence of Whittemore. Counsel for Welsh and Whittemore further represent that at no time during the pendency of the Superior Court cases did Welsh and Whittemore file any document describing themselves, or either of them, as non-residents of Massachusetts. They also advised that, in fact, both Welsh and Whittemore not only did not contest the validity of the "last and usual" service of process upon them, but entered general appearances in the Superior Court actions. Finally, counsel advised this court that the personal jurisdiction of the state court over Welsh and Whittemore has never been challenged or raised as an issue by them in that court and counsel concedes that an attempt to do so would be fruitless because they are both subject to the provisions of the "long arm" statute. The factuality of the preceding representations has not been challenged by counsel for Kinchla. The writ and return of service in both of the Superior Court cases are appended as exhibits to the brief filed herein by counsel for Welsh and Whittemore.

The opinion filed by Judge Murray for the three-judge court indicated that attachments made to acquire quasi in rem jurisdiction where the Massachusetts courts cannot otherwise obtain in personam jurisdiction might pass constitutional muster although made without prior notice and an opportunity to be heard. In the instant case quasi in rem jurisdiction was not necessary to perfect the jurisdiction of the Barnstable County Superior Court. Consequently, it is

ORDERED: the attachments involved herein must be, and hereby are, declared invalid on the basis of the ruling of the three-judge court cited above.

ANDREW A. CAFFREY,
Chief Judge.

Appendix B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STANLEY G. WELSH, ET AL.,
PLAINTIFFS

v.

RICHARD L. KINCHLA, ET AL.,
DEFENDANTS

CIVIL ACTION
No. 73-551-C

Opinion.

October 13, 1977.

CAFFREY, Ch.J.

This is a civil action in which plaintiffs seek to recover money damages for an alleged violation by defendants of plaintiffs' constitutional rights. The claim asserts a violation of 42 U.S.C.A. § 1983 consisting of defendants causing the making of an attachment of plaintiffs' real estate without prior notice or hearing. Plaintiffs, at the time of the alleged wrongful conduct, were owners of a tract consisting of approximately five hundred acres located on Cape Cod. Defendants are Richard L. Kinchla Real Estate, Inc., Richard L. Kinchla, a real estate broker, individually, and Stephen Weekes, Registrar of Deeds for Barnstable County.

The case was tried to the Court without a jury, and, after trial, I find and rule as follows. At the time of the attachment under attack, defendants followed the provisions of the Massachusetts statutes[1] setting out the procedure for the mak-

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[1] Mass. Gen. Laws Ann. Ch. 223, §§ 42, 62-66.

ing of real estate attachments. At a subsequent point of time, those Massachusetts statutes, to the extent they authorized pre-judgment attachments without notice or hearing, were declared to be unconstitutional by a three-judge court. *Bay State Harness Horse Racing and Breeding Association* v. *PPG Industries, Inc.*, 365 F. Supp. 1299 (D. Mass. 1973). At the trial, evidence was presented only by plaintiffs and the vast majority of that evidence went to the question of damages. When plaintiffs rested, defendants moved for a judgment in their favor on the issue of liability after which plaintiffs were granted time to, and did, file a memorandum of law in opposition to the allowance of the motion.

It is settled law that, where the issue is such that without weighing the credibility of the witnesses or the weight of the evidence, there is only one verdict which reasonable men could reach, it is proper for the Court to direct a verdict. *Harrington* v. *United States*, 504 F.2d 1306 (1st Cir. 1974). In so doing, the evidence is to be viewed and reasonable inferences are to be drawn in the light most favorable to the plaintiffs. *Id.* at 1312. In the instant case there is no issue of fact whatsoever. The simple legal question is whether a cause of action arises under 42 U.S.C.A. § 1983 against a person who follows a state statutory scheme which at some subsequent time is ruled to be unconstitutional. Plaintiffs have cited no case so holding, nor has the Court's research discovered any such decision. Contrariwise, the Court's research has revealed that decisions of the Courts of Appeal in the Second, Third and Tenth Circuits have unequivocally held that no cause of action arises under such circumstances. The matter was succinctly resolved by the observation, "[D]amages are not collectible in a civil rights action against one who followed a statutory procedure presumed to be constitutional," in *Rios* v. *Cessna Finance Corp.*, 488 F.2d 25, 28 (10th Cir. 1973). *Accord*, *Kacher* v. *Pittsburgh National Bank*, 545 F.2d 842 (3d Cir.

1976); *Tucker* v. *Maher*, 497 F.2d 1309 (2d Cir.), *cert. denied*, 419 U.S. 997 (1974).

Accordingly, I rule that defendants' motion for a judgment in their favor should be allowed and plaintiffs' complaint dismissed because, upon the facts and the law, no right to relief has been shown.

Order accordingly.

ANDREW A. CAFFREY,
Chief Judge.

Appendix C.

United States Court of Appeals

For the First Circuit

No. 77-1525

STANLEY G. WELSH, ET AL.,

PLAINTIFFS, APPELLANTS,

v.

RICHARD L. KINCHLA, ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ANDREW A. CAFFREY, *U.S. District Judge*]

Before

COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

Richard Wait, with whom *Franklin A. Walker, Jr.*, and *Choate, Hall & Stewart* were on brief, for appellants.
Gerald Saxe for appellees.

June 30, 1978

CAMPBELL, *Circuit Judge*. Plaintiffs filed this suit under 42 U.S.C. § 1983 on February 21, 1973, seeking relief for an alleged violation of federal due process rights resulting from an ex parte attachment of real estate pursuant to procedures then sanctioned by Massachusetts law. At about that time plaintiffs also joined as amici curiae in a suit pending before a three-judge district court challenging the constitutionality of the Massachusetts attachment law. On August 7, 1973, the three-judge court declared Massachusetts' attachment statute to be invalid. While the judgment was prospective as to others, it provided for relief to the immediate parties including amici. *Bay State Harness*

Horse Racing and Breeding Ass'n, Inc. v. *PPG Industries, Inc.*, 365 F. Supp. 1299 (D. Mass. 1973). The court below thereupon enjoined the attachment of plaintiffs' property and retained jurisdiction for the purpose of considering other relief. *Welsh* v. *Kinchla*, 386 F. Supp. 913 (D. Mass. 1975). A trial on the issue of damages was held on September 19, 1977, and at the close of plaintiffs' case defendants moved for a directed verdict. The district court took the case under advisement, and on October 13, 1977, granted the motion and dismissed the complaint. Plaintiffs appeal.

At the time of the challenged attachments plaintiffs owned some 500 acres on Cape Cod. They agreed to sell the tract only to learn that defendant Richard L. Kinchla Real Estate, Inc., had made an attachment returnable on January 1, 1973, in the sum of $350,000. The corporation did not pursue the first attachment, but Kinchla, in his individual capacity, filed an action for $225,000 in the Barnstable County Superior Court on January 2, 1973, pursuant to which he made a second attachment of the same property. Both attachments were made in conformity with Mass. Gen. Laws ch. 223, §§ 42, 62-66, by recording a copy of the writs with the Registry of Deeds of Barnstable County.

Because the attachments authorized under the Massachusetts statute took effect without notice or hearing being afforded to the owner of the real estate, the *Bay State* court held that §§ 42 and 62-66 violated the due process clause of the Constitution as interpreted by *Fuentes* v. *Shevin*, 407 U.S. 67 (1972). In line with other decisions applying *Fuentes* to pretrial attachment statutes, the court limited the effect of its judgment to parties before the court, parties in similar suits then pending, and attachments entered after the date of its order. *Id.* at 1307; *see Gunter* v. *Merchants Warren Nat'l Bk.*, 360 F. Supp. 1085 (D. Me. 1973); *Schneider* v. *Margossian*, 349 F. Supp. 741 (D. Mass. 1972); *cf. Higley Hill, Inc.* v. *Knight*, 360 F. Supp. 203 (D. Mass.

1973). The three-judge court made no reference to the prospect of parties enjoying the benefits of its judgment also maintaining an action for damages.

Most of the evidence submitted at the damages trial in the instant case concerned the extent of the consequential injuries caused plaintiffs by the attachments. There was no question but that defendants had followed the Massachusetts statute, which had not been declared unconstitutional at the time of the attachments. On the basis of defendants' reliance on the Massachusetts statute, the district court granted a directed verdict against plaintiffs, citing decisions in the Second, Third, and Tenth Circuits holding that damages are not collectible under § 1983 against a private party who follows a statutory prejudgment attachment procedure presumed to be constitutional. *See Kacher* v. *Pittsburgh Nat'l Bk.*, 545 F.2d 822 (3d Cir. 1976); *Tucker* v. *Maher*, 497 F.2d 1309 (2d Cir.), *cert. denied*, 419 U.S. 997 (1974); *Rios* v. *Cessna Finance Corp.*, 488 F.2d 25 (10th Cir. 1973).

We affirm. A plaintiff must prove malice when the wrong alleged to have been committed by a private party involves the institution of legal proceedings against the plaintiff. *Madison* v. *Manter*, 441 F.2d 537, 538 (1st Cir. 1971); *see G. H. McShane Co., Inc.* v. *McFadden*, 554 F.2d 111, 114 (3d Cir.), *cert. denied*, — U.S. — (1977); *Tucker* v. *Maher*, *supra*, 497 F.2d at 1315. The rule appears to be grounded on a recognition that a layman, ordinarily presumed to know the requirements of the law, cannot be expected to observe all the rules of which he might run afoul when affirmatively invoking the legal process. *Cf.* W. Prosser, Law of Torts § 120, at 854 (1971). In light of these authorities, a plaintiff alleging a violation of his civil rights through a wrongful invocation of legal proceedings against him must, to obtain damages, prove more than the use of an attachment procedure which, although under attack in the courts as violative of recent Supreme Court interpretations of due process, had not yet been declared invalid. The plaintiff must show some kind of ulterior motive on the part of the defendant or other evidence of wrongfulness sufficient to establish malice. Neither the pleadings nor proof in this case indicate malice on the part of defendants; their wrong was at most a failure to predict the future course of the law.

Affirmed.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-534.

STANLEY G. WELSH ET AL.,
PETITIONERS,

v.

RICHARD L. KINCHLA ET AL.,
RESPONDENTS.

Brief for the Respondents in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Opinions Below.

The opinions of the District Court of the District of Massachusetts and the United States Court of Appeals for the First Circuit appear as appendices to the Petition for a Writ of Certiorari.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Statutory Provisions Involved.

The pertinent section of the Civil Rights Act of 1871 (42 U.S.C. § 1983) is set forth in the Petition at pages 2-3.

Questions Presented.

Whether damages are collectible under 42 U.S.C. § 1983 against one who in good faith followed a statutory real estate attachment procedure, which was then valid and presumed constitutional.

Statement of the Case.

On January 2, 1973, individual respondent Richard L. Kinchla instituted a suit in the Barnstable County Superior Court against the petitioners for a real estate broker's commission due on the anticipated sale of a certain parcel of property, owned by the petitioners, known as "Highfield" and located in Falmouth, Mass. On December 2, 1977, the jury sitting at the trial returned a finding for the plaintiff Richard L. Kinchla with damages in the sum of $175,000.00. On December 15, 1977, judgment entered for the plaintiff broker in the sum of $175,000 plus interest thereon from February 5, 1973. On February 3, 1978, the petitioners filed a claim of appeal and the record is presently before the Court of Appeals of the Commonwealth of Massachusetts.

When the respondent initiated his action in the Massachusetts Superior Court, he also sought and was granted by the court a real estate attachment of the petitioners' property located in Barnstable County. There is no dispute that the attachment was made in conformance with Massachusetts General Laws c. 223, which detailed the statutory attachment procedure at that time. There is also no dispute that on January 2, 1973, when the respondent instituted his suit and made attachment of the petitioners' property, the Massachusetts real estate attachment statute had been validly enacted and was in full force and effect. Finally, there is no dispute that when the respondent's attorney attached the two petitioners' property, particularly since each maintained a winter residence out of this court's jurisdiction, he acted in accordance with the customary professional standards then in force in Barnstable County.

On August 7, 1973, a three-judge court decided *Bay State Harness Horse Racing and Breeding Association, Inc. v. PPG Industries, Inc.*, 365 F. Supp. 1299 (D. Mass. 1973). The case held that by reason of its failure to require notice in certain prescribed circumstances, the Massachusetts real estate attachment statute was unconstitutional. The complaint in the case at bar was filed in District Court February 21, 1973. In the wake of the *Bay State* decision, the petitioners moved to establish the invalidity of the attachments. On January 24, 1975, the District Court found the attachment constitutionally deficient and it was dissolved (A. 1a-4a). Thereafter the case was tried on the issue of damages. On October 13, 1977, the respondent's motion for judgment was allowed because "upon the facts and the law, no right to relief has been shown" (A. 7a). The court held further (A. 6a):

> "In the instant case there is no issue of fact whatsoever. The simple legal question is whether a cause of action arises under 42 U.S.C.A. § 1983 against a person who follows a state statutory scheme which at some subsequent time is ruled to be unconstitutional. Plaintiffs have cited no case so holding, nor has the court's research discovered any such decision."

An appeal was taken from the District Court's dismissal by the petitioners to the Court of Appeals for the First

Circuit. The Court of Appeals affirmed the judgment of the District Court, again holding that neither the pleadings nor proof in the case at bar showed a right to relief in the form of money damages (A. 8a-11a).

Argument.

I. The Decision Below Involves a Question of Federal Law Concerning the Redress Available under 42 U.S.C. § 1983 Which Has Been Consistently and Unequivocally Answered by the United States Courts of Appeals for Each Circuit Where the Issue Has Been Raised.

Whether damages are collectible under 42 U.S.C. § 1983 against a private party who follows a statutory real estate attachment procedure presumed to be constitutional is a question which has arisen several times over the past several years. The petitioners claim that the lack of a definitive decision on this issue has given rise to uncertainty and conflicting rationales in the various court's application of 42 U.S.C. § 1983 (Petition, p. 6), yet no amount of strained semantics should obscure the basic fact that Federal Courts have uniformly rejected the notion that damages will lie in a civil rights action against one who in good faith followed a statutory procedure presumed to be constitutional. See *Kacher v. Pittsburgh National Bank*, 545 F. 2d 842 (3d Cir. 1976); *Tucker v. Maher*, 497 F. 2d 1309 (2d Cir. 1974), cert. denied 419 U.S. 997 (1974); *Rios v. Cessna Finance Corporation*, 488 F. 2d 25 (10th Cir. 1973); *G. H. McShane Co., Inc. v. McFadden*, 554 F. 2d 111 (3d Cir. 1977), cert. denied 434 U.S. 857 (1977). It will be noted that in two of the cases cited immediately above, where the factual situations presented and the issues raised were almost identical to the present case, certiorari was denied by this Court.

The petitioners state that the decisions "cited in the opinion of the Court of Appeals are indicative of the lack of any consistent standard regarding liability under § 1983" (Petition, p. 7). A review of these decisions discloses, however, that the petitioners have failed to appreciate the steady development of rules in this sensitive area, which are both consistent with Supreme Court jurisprudence and fundamentally fair. The petitioners do recognize that in *Kacher v. Pittsburg National Bank*, supra at 847, the court denied liability because the defendant's actions lacked the "essential ingredient of tort liability at common law." The petitioners acknowledge that *G. H. McShane Co., Inc. v. McFadden*, supra, is in accord with this formula, yet they see fit to distinguish *Tucker v. Maher*, supra at 1315 where "the court required a showing of 'improper motive'" (Petition p. 7).

A closer reading of the *Tucker* decision indicates that the petitioners have failed to sense the identity of approach which characterizes all three of these opinions as well as the opinion below. In the *Tucker* decision, the court conducted a review of relevant authority which clearly indicated that "some nexus does exist between the nebulous § 1983 tort and its conventional common law counterpart." *Tucker v. Maher*, supra at 1314. This guiding principle was initially made clear by Mr. Justice Douglas in *Monroe v. Pape*, 365 U.S. 167, 187, 81 S. Ct. 473, 484, 5 L. Ed. 2d 492 (1961), where he stated that the statute should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." The Second Circuit Court then went on to apply this principle to the instant facts by adopting the language of Judge Goldberg in *Whirl v. Kern*, 407 F. 2d 781, 787-788 (5th Cir. 1969), cert. denied 396 U.S. 901, 90 S. Ct. 210, 24 L. Ed. 2d 177 (1969):

> "when an essential element of the wrong itself under well established principles of tort law includes the demonstration of an improper motive as in malicious prosecution, . . . then such principle becomes a part of sec. 1983."

Two years after the *Tucker* opinion the Third Circuit in *Kacher v. Pittsburg National Bank,* supra at p. 847, adopted an indistinguishable approach by stating, "As the plaintiff in a tort action for malicious prosecution must establish improper motive on the part of the defendant, so must a plaintiff asserting the analogous section 1983 claim." Then, one year later the Third Circuit, in *G. H. McShane Co., Inc. v. McFadden,* supra at 114, affirmed the continued viability of the principles stated in *Kacher* by holding that under facts such as those in the present case, "the plaintiff would have to allege and prove wrongful motive on the part of the creditor in order to hold him answerable in damages."

The petitioners also contend that the earliest United States Court of Appeals case to treat the issue, *Rios v. Cessna Finance Corporation,* supra, contributes to their finding of confusion in this area. At page 7 of the Petition it is argued that the Tenth Circuit Court would not allow recovery in any circumstances. Yet analysis of the opinion reveals that the court reached no such finding since it is expressly stated that "although Rios now questions the good faith of Cessna Finance in proceeding under the replevin laws of New Mexico, we believe no factual issue on the question exists." *Rios v. Cessna Finance Corporation,* supra at 28.

The conclusion of this crucial aspect of the petitioners' argument is that "None of the cases cited sets forth any clear or uniform guideline or standard for imposition of § 1983 monetary liability, nor does any of them support the conclusion of the Court of Appeals that a plaintiff

must establish 'malice'" (Petition, p. 7). Respondents strongly urge that the petitioners have conducted a superficial and manifestly incorrect review of these opinions, and their finding of confusion in this area is without basis. The cases discussed above and cited in the opinion below in fact provide a set of standards which are uniform in their holding that there is no civil rights cause of action for damages in cases such as the present one, without a showing that the defendant's actions were wrongful.

II. The Courts Below Were Correct in Their Denial of the Petitioners' Claim for Money Damages under 42 U.S.C. § 1983.

A. The petitioners commence their analysis of the Court of Appeals' purported error with the observation that, "[t]he holding of the Court of Appeals goes well beyond any of the cases cited therein" (Petition, p. 7). There is no justification, the petitioners say, for granting either absolute or qualified immunity to a private citizen who acts in accordance with a statute which ultimately may be held to be unconstitutional. They argue that such a person must be distinguished from a public servant and that this is "the distinction which apparently the Court of Appeals and the District Court did not recognize" (Petition, p. 9). Again respondents urge that the petitioners have shown little grasp of the Court of Appeals opinion and in this instance their attempt to invent inconsistencies has no textual grounds.

The petitioners support their analysis of the Court of Appeals' supposed error by focusing attention on that court's reliance on *Rios v. Cessna Finance Corporation,* supra, and *Tucker v. Maher,* supra. The *Rios* court cited the case *Baxter v. Birkins,* 311 F. Supp. 222 (D. Colo. 1970) as authority for its holding. *Birkins* did involve a

public official, while the *Tucker* case involved multiple defendants, some of whom were public officials. For these reasons, the petitioners apparently conclude that the Court of Appeals has granted "either absolute or qualified immunity" to private citizens who act in accordance with statutes which are later rendered unconstitutional. What the petitioners fail to appreciate is that *Rios* and *Tucker* involve private party defendants, and in each decision the court's primary focus is upon the rights of such private citizens. There is mention in *Rios* of *Birkin*, a case dealing with a public official, but it should be noted that the Court of Appeals in the opinion below did not even cite this decision.

The petitioners' characterization of *Tucker v. Maher*, supra, as demonstrative of the Court of Appeals' misunderstanding of relevant precedent is equally perplexing. For this decision, delivered by the United States Court of Appeals for the Second Circuit, contains perhaps the most compelling judicial explanation why civil rights damages should be available against a private individual who acted in accordance with a then constitutional statute only in a narrowly defined set of circumstances. Constitutional law, Judge Mulligan observed, "particularly in this difficult and confusing area of state action and due process, is hardly predictable with any degree of certainty. . . . [R]ecent history . . . should convincingly indicate that the role of the prophet is precarious." *Tucker v. Maher*, supra at 1315.

Private citizens and counsel who represent them should be able to, and have a right to, rely on statutory law which has been neither repealed nor replaced. As the court states, the role of the attorney would be particularly precarious if such good faith reliance were deemed insufficient:

> "If counsel had failed to file the lien to protect his client, he might well be exposed to personal liability. State legislation is under increasing constitutional attack but until the assault is successful, attorneys should be entitled to rely upon the presumption of constitutionality." *Tucker v. Maher*, supra at 1316.

The *Tucker* court concluded that dependence upon a statutory scheme which is subsequently termed unconstitutional is not to be equated with the malevolent intent basic to the tort of malicious prosecution. In light of this authority, as well as its confirmation in the *Kacher* and *McShane* opinions, the Court of Appeals concluded:

> "a plaintiff alleging a violation of his civil rights through a wrongful invocation of legal proceedings against him must, to obtain damages, prove more than the use of an attachment procedure which, although under attack in the courts as violative of recent Supreme Court interpretations of due process, had not yet been declared invalid" (A. 10a-11a).

What the plaintiff must prove in such cases is "some kind of ulterior motive on the part of the defendant or other evidence of wrongfulness sufficient to establish malice" (A. 11a). The petitioners argue that such a holding goes well beyond the holding of *Tucker* or any of the cases which followed. Respondents respectfully submit that this argument is completely without merit and displays a profound lack of understanding of recent developments in this area of substantive law.

B. As another ground of error, the petitioners contend that under the principles set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), full retroactive application of *Bay State Harness Horse Racing and Breeding Association, Inc. v. PPG In-*

dustries, Inc., 365 F. Supp. 1299 (D. Mass. 1973) (wherein the Massachusetts pre-judgment real estate attachment procedure was termed unconstitutional) applies to the petitioners' action. The petitioners acknowledge that the initial inquiry required by *Chevron Oil* is "whether the party urging nonretroactivity should have relied upon 'clear past precedent'" (Petition, p. 10). The result in *Bay State*, the petitioners assert, did not overrule past precedent, but rather had been clearly foreshadowed in *Schneider v. Margosian*, 349 F. Supp. 741 (D. Mass. 1972), wherein the Massachusetts statute providing for ex-parte pre-judgment attachment by way of trustee process had been declared unconstitutional. In fact, the petitioners argue, any distinction between the constitutional infirmity of the trustee process statute and the real estate attachment statute "is negligible" (Petition, p. 4).

Closer analysis of *Bay State* and *Schneider* indicates that while the opinions share certain concerns, they are focused on specific civil rights so substantially different, their distinction can hardly be designated negligible. In *Schneider*, Judge Garrity noted that the Massachusetts trustee process statute under attact authorized the garnishment of wages. Thus, it was found that *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969), was directly on point. Judge Garrity observed that the Supreme Court's opinion had noted that "garnishment visits special hardship on the poor and asserted that wages are a special form of property, even a temporary loss of which could 'drive a wage earning family to the wall.'" *Schneider v. Margosian*, supra at 744.

Bay State does not deal with trustee procedure, nor with any of the special problems such a concern entails. Rather it is concerned with real estate attachment procedure, and while it involves some similar due process issues, it also deals with such unique issues as the importance of real estate attachments in securing quasi in rem jurisdiction. Yet the petitioners conclude that "[g]iven the trend signalled by *Schneider* and other procedural due process cases being decided at that time, the respondents could not have reasonably relied on the constitutionality of the attachment statute" (Petition, p. 10).

Note should be taken at this point that the other due process cases being decided at that time did not provide such an unequivocal foreshadowing of future developments as the petitioners suggest. In fact as the court notes in *Bay State*, supra at 1305, in *Black Watch Farms, Inc. v. Dick*, 323 F. Supp. 100 (D. Conn. 1971) a United States District Court had "held constitutional Connecticut real estate attachment statutes similar in almost every respect to the Massachusetts statutes." In view of the unanimous holding that neither public official nor private party should be held to the impossible duty of predicting the future course of constitutional law, it seems indisputable that the petitioners' attempt to apply *Bay State* retroactively should be unsuccessful.

Conclusion.

For the reasons stated above it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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